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No. 133

In the Supreme Court of the United States

OCTOBER TERM, 1942

ROBERT H. CORY, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE THIRD
CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 6-11) is unreported. The opinion of the Circuit Court of Appeals (R. 108-117) is reported at 126 F. (2d) 689.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 12, 1942. (R. 118.) Petition for a writ of certiorari was filed June 9, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The taxpayer created four trusts for the benefit of his wife and his three sons, respectively. The duration of each trust, as amended, was restricted to ten years, or to the death of the taxpayer, or to the death of the survivor of the taxpayer's wife and the sons, whichever should occur first. Upon termination, the principal was to be paid over to the taxpayer or to his estate. The trustee was required to invest the principal and give voting proxies on all stocks held, in such manner as taxpayer might direct. Is the taxpayer accountable under Section 22 (a) of the Revenue Acts of 1934 and 1936 for the 1935 and 1936 income of the trusts?

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set out in the Appendix, *infra*, pp. 10-15.

STATEMENT

The Board of Tax Appeals found the following facts (R. 6-9):

On April 6, 1929, taxpayer created four revocable trusts, one for the benefit of his wife and the others for the benefit of his three sons, one for each son. One Clinton H. Blake was made trustee of each trust. (R. 6.)

The trust for the wife provided that the income thereof was to be paid over to her during her life in the trustee's discretion. Any income not so

paid over to her was to go to her upon the termination of the trust, or to her estate upon her death. Upon her death the principal was to be paid over to taxpayer, or, if he were dead to be divided into shares and held in trust for taxpayer's living issue on terms and conditions not here material. The corpus of this trust consisted of stock in the O'Sullivan Rubber Company and Lamont, Corliss & Company (R. 6-7).

In each of the trusts for the sons the trustee was to pay over to the beneficiary such portions of the income of the trust as should in the judgment of the trustee be necessary or desirable for the beneficiary's education, maintenance and support, not to exceed \$3,000 in any year if the total income were \$9,000 or less, but if the total income exceeded \$9,000, \$3,000 plus half of any excess. The balance of the income was payable to taxpayer's wife in the wisdom of the trustee. After the first beneficiary, i. e., the son, reached the age of 21 he was to be paid \$3,000 yearly plus half of any excess of income over \$9,000. When he reached 25, he was to receive one-fourth the principal and half the income; when he reached 30, he was to receive one-third of the remaining principal and one-half the income; and when he reached 35 he was to receive all the principal. Any undisposed of income was to be paid to taxpayer's wife. Should the son die before receiving the entire principal, the principal was to be paid over to tax-

payer, or to his wife if he should be dead, or to the son's next of kin if both taxpayer and his wife should be dead. The corpora of these trusts consisted of stock in Pond's Extract Company and Pond's Extract International, Ltd. (R. 7.)

Each trust contained the following provision (R. 7-8, 29, 38):

The Trustee is hereby authorized to retain any property received by him hereunder in the form of investment in which such property is received, although such property be not of the character of investments permitted to trustees by law, and the Trustee shall during the life of Mr. Cory retain, dispose, invest, reinvest and otherwise deal with the principal of the trust fund, and shall issue voting proxies on all stocks held, in such manner as Mr. Cory may direct, regardless of the restrictions imposed by law upon trustees. The Trustee may retain as permanent investments of the trust or trusts any assets forming part of the original principal hereof, or forming part of the principal at the time of Mr. Cory's death, and may at all times invest and reinvest the principal of the trust in such forms of investment as he may deem expedient, (subject, however, to the directions of Mr. Cory during his lifetime) any legal restrictions upon trustees and investment of trust funds notwithstanding.

Each trust also contained this provision (R. 8, 30, 40):

If Mr. Blake shall cease to serve as Trustee hereunder for any reason, The Citizens National Bank and Trust Company of Englewood is hereby appointed to act as substitute trustee, provided, however, that Mr. Cory reserves the right to revoke such appointment and to designate another substitute trustee at any time not later than sixty days after Mr. Blake shall cease to serve as Trustee, in which event the aforesaid Bank waives any rights to commissions.

It was further provided in each trust that stock dividends should constitute principal, but that in all other instances the trustee in his sole discretion should determine what receipts were principal and what were income and what expenses should be charged against either principal or income. (R. 8, 31, 40-41.)

On January 8, 1935, taxpayer *amended* all four trusts. Their duration was now restricted to ten years, or to the death of taxpayer, or to the death of the survivor of taxpayer's wife and the children, whichever event should first occur. (R. 45, 49.) Upon the termination of the trust the principal was to be paid over to taxpayer or to his executor or administrator. (R. 8-9.) In addition each trust was amended so as to contain the following (R. 9, 47, 51-52):

Mr. Cory shall have the right at any time during the term of the trust by written instructions delivered to the Trustee, to change, modify or alter any the administra-

tive provisions of this agreement but he shall not have the power at any time to change the distributive provisions or to affect the beneficial interests created hereunder or to revoke this trust in whole or in part or to re-vest in himself title to any part of the corpus of the trust, except that he shall have such powers or any of them with the consent of the beneficiary or beneficiaries currently entitled to the income hereunder. No part of the income of the trust shall be distributed to Mr. Cory or be held or accumulated for future distribution to him or applied to the payment of premiums upon policies of insurance upon his life. Upon the termination of the trust no part of the income theretofore accumulated by the Trustee, pursuant to the provisions hereinabove contained, shall be payable to Mr. Cory, but all such accumulated income shall be paid to the beneficiary entitled thereto.

The Commissioner taxed to the grantor the income of the trusts for 1935 and 1936.¹ Upon review, the Board of Tax Appeals sustained the Commissioner's action. (R. 5, 6-11.) The Circuit Court of Appeals affirmed. (R. 108-117, 118.)

¹ The explanation given in the deficiency letters was that the trusts were revocable trusts whose income was taxable to the grantor under Section 166 of the Revenue Acts of 1934 and 1936. (R. 24, 62.) At the trial before the Board the Commissioner amended his answers to allege (R. 73-74) that the income of the four trusts was taxable to the taxpayer under the provisions of Section 22 (a) of the Revenue Acts of 1934 and 1936. Taxpayer expressly entered "no objection" to these amendments. (R. 74.)

ARGUMENT

Both the Board of Tax Appeals and the court below correctly ruled that the grantor was taxable upon the income of the four trusts under the principles of *Helvering v. Clifford*, 309 U. S. 331. As amended, the trusts had a maximum duration of ten years; the income was to be distributed to member's of the grantor's immediate family; the corpora were to be restored to the grantor upon termination of the trusts; and substantial control over the administration of the trusts was reserved to the grantor in that he could direct trust investments, vote the stock held in trust, change any of the administrative provisions of the trust agreements, and name successor trustees.

Although some factual differences obviously exist between this case and the *Clifford* case, they are in essence the same. The taxpayer, while retaining substantial control over his property, has deflected income therefrom for a fixed period to members of his immediate family. The principles requiring the taxpayer to account for such income have been applied in many cases presenting a variety of factual backgrounds. E. g., *Hormel v. Helvering*, 312 U. S. 552; *White v. Higgins*, 116 F. (2d) 312 (C. C. A. 1st); *Commissioner v. Berolzheimer*, 116 F. (2d) 628 (C. C. A. 2d); *Commissioner v. Buck*, 120 F. (2d) 775 (C. C. A. 2d); *Commissioner v. Barbour*, 122 F. (2d) 165 (C. C. A. 2d); *Helvering v. Elias*, 122 F. (2d) 171 (C. C. A. 2d); *Commissioner*

v. *Lamont* (C. C. A. 2d), decided April 24, 1942, not yet officially reported but may be found in 1942 Prentice-Hall, Vol. 4, par. 62,686; *Whiteley v. Commissioner*, 120 F. (2d) 782 (C. C. A. 3d), certiorari denied, 314 U. S. 657. Cf. *Helvering v. Richter*, 312 U. S. 561; *Commissioner v. O'Keeffe*, 118 F. (2d) 639 (C. C. A. 1st); *Commissioner v. Ward*, 119 F. (2d) 207 (C. C. A. 3d); *Commissioner v. Brown*, 122 F. (2d) 800 (C. C. A. 3d); *Commissioner v. Central Nat. Bank*, 119 F. (2d) 470 (C. C. A. 6th); *Commissioner v. Goulder*, 123 F. (2d) 686 (C. C. A. 6th). See also *Helvering v. Horst*, 311 U. S. 112; *Helvering v. Eubank*, 311 U. S. 122; *Harrison v. Schaffner*, 312 U. S. 579.

The fact that the trusts herein might last ten years does not change the result. The *Clifford* case has been regarded as applicable in cases of trusts having comparable potential duration. See *Commissioner v. Berolzheimer*, *supra*; *Commissioner v. O'Keeffe*, *supra*. Cf. *Helvering v. Fuller*, 310 U. S. 69, 76.

Petitioner suggests conflicts with various cases in which the courts have refused to apply the *Clifford* case. *Commissioner v. Branch*, 114 F. (2d) 985 (C. C. A. 1st); *Commissioner v. Bateman*, 127 F. (2d) 266 (C. C. A. 1st); *Commissioner v. Chamberlain*, 121 F. (2d) 765 (C. C. A. 2d); *Commissioner v. Jonas*, 122 F. (2d) 169 (C. C. A. 2d); *Suhr v. Commissioner*, 126 F. (2d) 283 (C. C. A. 6th); *Commissioner v. Armour*, 125 F. (2d) 467 (C. C. A. 7th); *Jones v. Norris*, 122 F. (2d)

6 (C. C. A. 10th). But regardless of whether those decisions are correct, they are distinguishable from the instant case. Thus, life estates rather than ten-year trusts were involved in the *Branch*, *Bateman*, *Armour*, and *Suhr* cases. In the *Jonas* case, unlike the case at bar, the grantor had not reserved any control over the corpus, and the *Jonas* case has been regarded by the same circuit court of appeals in *Helvering v. Elias*, 122 F. (2d) 171, as turning upon the absence of control. The *Chamberlain* case involved a charitable beneficiary rather than a member of the grantor's family, and even the court which decided that case has since in effect receded from the position taken therein. *Commissioner v. Lamont* (C. C. A. 2d), April 24, 1942. Finally, *Jones v. Norris* involved a trust for twenty years, and the settlor had no reversion.

CONCLUSION

The case was correctly decided by the court below. There is no conflict of decisions. The petition should be denied.

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